

## ***6 Official Opinions of the Compliance Board 23 (2008)***

**ADMINISTRATIVE FUNCTION – EXCLUSION –  
BRIEFING BY SCHOOL SYSTEM OFFICIALS, HELD TO BE  
WITHIN THE EXCLUSION – STATUS OF DISCUSSION  
ABOUT RETAINING A LOBBYIST – CLOSED SESSION  
PROCEDURES – VOTING – VOICE VOTE PERMISSIBLE  
IF PROPERLY DOCUMENTED – MINUTES – CLOSED  
SESSION STATEMENT – FAILURE TO CITE STATUTORY  
AUTHORITY, HELD TO BE A VIOLATION**

March 21, 2008

*David L. Cahn, Co-Chair  
Citizens for an Elected Board*

The Open Meetings Compliance Board has considered your complaint that the Prince George's County Board of Education ("County Board") violated the Open Meetings Act in connection with meetings held in the months of October and November, 2007. To address the issues more clearly, we have departed from the sequence with which they were presented in the complaint.

For the reasons explained below, we conclude as follows: (1) The County Board properly treated certain matters raised in the complaint as administrative functions, outside the scope of the Open Meetings Act. (2) Because we have been provided insufficient information, we reach no opinion about the status of discussions resulting from a proposal by a potential lobbyist. (3) The County Board did not violate the Act by conducting a voice vote in closing its meetings. (4) The statutory authority relied on in closing the meetings was adequately cited in a written statement at the time of closure. (5) The County Board failed to include in the minutes of its October 11, 2007, meeting the specific statutory citation under which the session was closed. (6) The topic of the closed session on November 12, 2007, as related to the exception for legal advice, was adequately described.<sup>1</sup>

---

<sup>1</sup> The complaint mentioned that two additional closed meetings occurred during October but were never disclosed in subsequent minutes of the County Board. The complaint provided no additional information in connection these sessions, and the response did not engage the point. Thus, we decline to address this aspect of the complaint.

**I**

**Administrative Functions**

***A. Briefings of the County Board***

**1. Complaint and response**

The complaint alleged that the County Board violated the Open Meetings Act by improperly holding closed sessions during the following briefings by school system personnel: on October 11, an update from the school system's internal auditor; also on that date, a briefing by the County Board's general counsel on the status of Environmental Protection Agency compliance issues; and on October 17, a briefing by Messrs. Lawrence Fryer and Larry Pauling regarding charter school compliance matters.

In the complainant's view, all of these involved the County Board's carrying out of legislative functions. The auditor's briefing involved "legislative oversight over the way the superintendent (not the school board) was conducting the fiscal affairs of the school system, a matter of vital interest to the general public." Similarly, the environmental issues briefing should have been addressed in an open meeting in light of its "extreme importance to the public."

In a timely response on behalf of the County Board, Andrew Nussbaum, Esquire, and Roger Thomas, Esquire, contended that all three briefings constituted administrative functions to which the Act did not apply. The response may be summarized as follows:

The County Board has an internal auditing department responsible for conducting financial and performance audits of units within the school system. During the October 11 closed session, the auditor provided a preliminary report in connection with an audit then underway. Because the audit had not been completed, there was a need for continued confidentiality so that the auditors could complete their work. The audit "concerned ongoing performance issues ... and ... did not involve the development of any new school system policies." While the complainant characterized the audit update as "a matter of vital interest to the general public," this is not the standard for applying the administrative function exclusion. Citing our long-established test for evaluating whether a particular matter constitutes an administrative function, the response argued that the audit update was analogous to several matters that we have held were within the exclusion. Similarly, the response contended that the briefings of the County Board on environmental and charter school compliance issues involved an administrative function.

After our receipt of the County Board’s response, we received a second letter from the complainant reiterating the view that the oversight activities involved a legislative function. Drawing an analogy to Congressional oversight hearings and oversight hearings by the General Assembly, the supplemental complaint noted that such hearings are the means by which “a legislative body determines whether its policies are being carried out effectively and as intended. [Oversight hearings], in a very real sense, [are] the starting point of much policy development.” In response, Messrs. Nussbaum and Thomas countered that characterizing the County Board’s oversight activities as a legislative function is a misreading of the Open Meetings Act.

## **2. Analysis**

The Open Meetings Act generally does not apply when a public body is carrying out an administrative function. § 10-503.<sup>2</sup> The Act defines “administrative function” as follows:

(1) “Administrative function” means the administration of:

- (i) a law of the State;
- (ii) a law of a political subdivision of the State; or
- (iii) a rule, regulation, or bylaw of a public body.

(2) “Administrative function does not include:

- (i) an advisory function;
- (ii) a judicial function;
- (iii) a legislative function;
- (iv) a quasi-judicial function; or
- (v) a quasi-legislative function.

---

<sup>2</sup> Except as otherwise noted, all statutory references are to the Open Meetings Act, Title 10, subtitle 5 of the State Government Article, Annotated Code of Maryland.

§ 10-502(b). In an extensive body of opinions applying the concept initially termed an “executive function” – now labeled an “administrative function”<sup>3</sup> – we have adopted a two-part analysis. We first inquire whether the topic of discussion falls within the definition of any other defined function. If so, the analysis is complete, because, by definition, the topic could not be considered an administrative function. If the topic of discussion does not fall under an alternative defined function, we then consider whether the public body was involved in the “administration of” an existing law, rule, or regulation. If not, the discussion cannot be an administrative function. *See, e.g., 5 OMCB Opinions* 121, 124 (2007).

If a matter is an administrative function under this analysis, it is excluded from the Act, no matter how important the matter might be considered or how keen the level of public interest in it. While public interest may well be a useful barometer for a public body’s considering whether, as a discretionary matter, it will discuss an administrative matter in a public session rather than a closed session, that it is not the test under the Open Meetings Act for evaluating whether a matter is or is not an administrative function.

The only two other functions defined in the Act that might possibly be germane to this issue are the “legislative function” and “quasi-legislative function.” A “legislative function” is defined as “the process or act of: (1) approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy; (2) approving or disapproving an appointment; (3) proposing or ratifying a constitution or constitutional amendment; or (4) proposing or ratifying a charter or charter amendment.” § 10-502(f). A “quasi-legislative function” is defined as “the process or act of: (1) adopting, disapproving, amending, or repealing a rule, regulation, or bylaw that has the force of law, including a rule of a court; (2) approving, disapproving, or amending a budget; or (3) approving, disapproving, or amending a contract.” § 10-502(j).

It seem evident that the briefings on October 11 and 18 do not fit within these definitions. Hence, we consider whether they were in furtherance of the County Board’s carrying out of current law.

Subject to State statutory and regulatory requirements, the County Board is responsible for educational matters in Prince George’s County. § 4-101(a) of the Education Article (“ED”), Annotated Code of Maryland. In carrying out its responsibilities, the County Board wears several hats. Certain functions of the County Board would be deemed legislative (*e.g.*, establishing policy) or quasi-legislative (*e.g.*, approving a contract) under the Open Meetings Act. *See*, 3

---

<sup>3</sup> *See* Chapter 584, Laws of Maryland 2006.

*OMCB Opinions* 39, 40-41 (2000). Other functions of the County Board would be considered administrative and so outside the Act.<sup>4</sup>

We have previously held that implicit in a local board of education's authority to appoint a school superintendent is oversight responsibility for the superintendent's performance. 3 *OMCB Opinions* at 41. This principle would extend to oversight of any unit within the school system ultimately accountable to the board. Furthermore, a local board of education ordinarily holds school system property in trust for the benefit of the system. ED § 4-114. Thus, the County Board is expected to exercise oversight responsibility over school property. Similarly, in authorizing operation of a public charter school, the County Board has responsibility for evaluating its operations. ED § 9-101, *et seq.* This role would also result in oversight responsibilities.

Given respondent's representations about the nature of the briefings, we have no reason to believe that the scope of discussion went beyond reviewing current operations or that the discussion resulted in any suggested changes in policy. We therefore agree with the County Board that these matters involved administrative functions outside the scope of the Act.

***B. Proposal by a Lobbyist***

**1. Complaint and response**

The complaint pointed out that the October 11 minutes, under the caption "administration functions," stated that the County Board had received a proposal from a potential lobbyist. The complaint noted that it is unclear whether the proposal was solicited or unsolicited or whether any discussion ensued regarding contracting for lobbying services, but "it certainly related to the legislative functions of the school board" and should have been addressed in a public session. The supplemental complaint elaborated that the consideration of the lobbyist's proposal was a policy matter – that is, "whether ... to procure the services of an outside contractor to lobby on behalf of the [County Board], when the school system already had its own lobbyist." The complaint also raised the concern that the topic of hiring of a lobbyist came up again at the October 18 meeting.

The response noted that the October 11 minutes accurately reflected what transpired: the County Board simply received the packet without any further action. The response went on to argue that the matter of the County Board's retaining a

---

<sup>4</sup> The County Board is also responsible for carrying out quasi-judicial functions under the Act. 90 *Opinions of the Attorney General* 17 (2005). As is true of the administrative function exclusion, however, a public body carrying out a quasi-judicial function generally is not subject to the Act. §10-503(a)(1)(iii).

lobbyist is an administrative function outside the scope of the Act. Under ED § 4-101(b), the County Board is to “seek in every way to promote the interests of” the Prince George’s County Public Schools. Retaining a lobbyist might be one way of doing so. Further, the County Board’s own appointment of a lobbyist is not a quasi-legislative function, because it would not entail approving or disapproving anyone else’s action.

## **2. Analysis**

If the only thing that happened at the October 11 meeting is what the minutes suggest – someone acknowledged that a proposal was received, without further discussion – there was no violation. Merely informing a public body that a piece of mail arrived on a certain topic, with no discussion of its substance, is a housekeeping matter, as much an administrative function as, for example, merely presenting a document to be signed. 3 *OMCB Opinions* at 43-44.

At the October 18 meeting, the minutes confirm that this matter was a subject of discussion during a closed portion of the meeting. Unfortunately, we were not provided with enough information about the nature of that discussion to reach a conclusion about its status under the Act.

At least in theory, the discussion might have been separate from the sales pitch of the particular lobbyist. That is, the County Board might have discussed whether the methods it had previously used “to promote the interests of” the school system in the General Assembly had been effective and whether hiring a professional lobbyist might be worth the cost. Such a discussion, in our view, is an “administrative function,” because it does not fall within any other defined function and is not really policy making. A discussion of *what* the County Board should lobby for might well fall within another defined function or be a policy question. See 4 *OMCB Opinions* 12 (2004). By contrast, a discussion of *how* the County Board can most effectively lobby – that is, carry out ED § 4-101(b) in Annapolis – is an administrative function.

The other possibility is that some of the County Board’s discussion involved the pros and cons of the proposal on the table. Even initial consideration by the County Board concerning a potential contract with the self-promoting lobbyist would be considered a quasi-legislative function under the Act and consequently could not be considered an administrative function. §§ 10-502(b)(2)(v) and (j)(3); 10-503. The response cited, among other authority, 1 *OMCB Opinions* 123 (1995) for the proposition that when a local board is making rather than approving an appointment, it is engaged in what is now labeled an administrative function. True enough, as far as it goes. But the same opinion also recognized that consideration of a contract amendment would be a quasi-legislative function under the Act. 1 *OMCB Opinions* at 124. In our view, even preliminary discussions about a specific service

contract for an outside lobbyist to represent the County Board would be a quasi-legislative function; therefore, the Act would have applied.

Given insufficient information about the nature of the discussion on October 18, we reach no conclusion on this point. *See* § 10-502.5(f)(2).<sup>5</sup>

## **II**

### **Closed Session Procedural Requirements**

#### ***A. Record of Voice Vote***

##### **1. Complaint and response**

According to the complaint, the October 11 and 18 meetings, and apparently a meeting on November 12, were closed based on a voice vote rather than a roll call vote. The concern expressed in the complaint was that staff could misinterpret a member's silence as a sign of acquiescence, rather than as an intended abstention.

In its response, the County Board noted that § 10-509(c)(2)(ii) requires the minutes to reflect "a record of the vote of each member as to the closing of a session" but does not address the manner that votes must be cast. Quoting from 3 *OMCB Opinions* 197, 200 (2002), the response contended that the Open Meetings Act "does not prohibit a voice vote, so long as individually identifiable votes are recorded. The purpose of this requirement is to promote public accountability in the decision to close the meeting." Finally, the response characterized as "common practice" that members of a public body have the opportunity to review minutes before approval. If a member of the County Board noted an error in the draft minutes (for example, an intended abstention noted as an affirmative vote), "it is incumbent on that individual to call that error to the attention of the staff, or voice the correction at the next meeting, so that a correction ... can be made prior to approval."

##### **2. Analysis**

The Open Meetings Act does not bar a voice vote to close a meeting, as long as the minutes properly reflect the members of the public body present, and any dissenting vote is reflected. 3 *OMCB Opinions* 197, 200 (2002). Those who participate in the chorus of "ayes" are as responsible for their individual votes to

---

<sup>5</sup> The minutes of the October 18 meeting recite that the County Board "consulted with counsel" about the hiring of a lobbyist. This point was not pursued in the County Board's response. Accordingly, we do not express an opinion whether any portion of the discussion, assuming it was not an administrative function, might have been permissibly closed under § 10-508(a)(7).

close as if a roll call were taken. To be sure, silence in the midst of a voice vote can be misunderstood, but it is up to the silent member to verify that silence intended as an abstention is recorded correctly.

***B. Disclosure of Statutory Authority***

**1. Complaint and response**

The complaint stated that the motion to close the session on October 11 did not cite the specific authority under which the session was closed, as required under § 10-509(c)(2)(iii), but simply referred to “§ 10-508” as a whole.

The response disputed the suggestion that the County Board failed to cite the applicable authority under which the session was closed. Accompanying the response was a copy of a County Board form captioned “Motion to Meet in Executive Authority,” on which the County Board president checked the applicable provisions of § 10-508(a).

**2. Analysis**

There is no merit to the complaint’s criticism of the language employed in the motion for closure; the motion itself need not include a reference to the specific statutory authority. The Act does require that the authority be reflected as part of a written statement completed at the time the session is closed. § 10-508(d)(2)(ii). The documentation submitted with the response shows that this requirement was satisfied. The complaint, however, specifically referred to § 10-509(c)(2)(iii), which imposes a *distinct* requirement that the minutes of a public session prepared after a closed session reflect certain information in connection with the closed session, including “a citation for the authority ... for closing the session.” While the minutes for October 11 repeated the language in § 10-508(a)(1)(i), the actual statutory citation was not included, as it should have been. This is a violation.

***C. Adequacy of Topic Description***

**1. Complaint and response**

The November 12 meeting was closed in part, according to the minutes, “to consult with counsel to obtain legal advice on a legal matter.” The complaint alleged that this statement omitted a description of the topic, as required by § 10-509(c)(2)(4).

The response pointed out that the topic description immediately followed the reference to the exception: “The subject of ‘employee appeals’ can be a broad topic

that often involves the giving of legal advice by counsel, as to the procedures to be utilized in such matters.”

**2. Analysis**

In our view, this topic description meets the requirement in § 10-509(c)(2)(4). *See, e.g., 4 OMCB Opinions* 46, 49-50 (2004).

**III**

**Conclusion**

In summary, we find that the County Board properly treated certain matters raised in the complaint as administrative functions, outside the scope of the Open Meetings Act.<sup>6</sup> We are unable to reach a conclusion about the status of discussions resulting from a proposal by a potential lobbyist. We find that the County Board did not violate the Act by conducting a voice vote in closing its meetings. We also find that statutory authority relied on in closing the meetings were adequately cited in a written statement at the time of closure, and the topic of the closed session on November 12, 2007, as related to the exception for legal advice, was adequately described. However, the County Board failed to include in the minutes of its October 11, 2007 meeting the specific statutory citation under which the session was closed.

OPEN MEETINGS COMPLIANCE BOARD

*Elisabeth L. Nilson*  
*Courtney J. McKeldin*  
*Tyler G. Webb*

---

<sup>6</sup> One such item at the October 18 meeting was a change in the date of a future meeting. In our opinion, the mere rescheduling of a meeting, without any discussion of agenda matters, qualifies as an administrative function excluded from the Act.